

Waste Management of Santa Clara Co., Inc., d/b/a Recycle America and Sanitary Truck Drivers & Helpers Local 350, International Brotherhood of Teamsters, AFL-CIO.¹ Case 32-CA-11622

July 28, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On December 27, 1991, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The Respondent contends that the allegations of the complaint should be dismissed under Section 10(b) of the Act because they are not closely related to the allegations contained in the charge. In agreement with the judge, we find no merit to this contention for the following reasons.

The charge consisted of specific allegations of unlawful grants of wage increases and threats of retaliation against employees for their support of the Union; but it referred to these as part of the Respondent's "interfer[ence] with the freedom of the employees to make a fair choice of representation" during "the course of an election campaign related to Case No. 32-RC-3344." Although the complaint alleged acts of interference different from those specifically alleged in the charge, the reference in the charge to the Respondent's interference with the particular organizational campaign was sufficient to support the complaint allegations that the Respondent sought to undermine and discourage employee support for the Union by interrogating employees, soliciting grievances and impliedly promising to remedy them, and soliciting employees to campaign against the Union. As the Board held in *Well-Bred Loaf, Inc.*, 303 NLRB 1016 fn. 1 (1991), a sufficient nexus between charge and complaint is established when all the allegations involve "part of an overall plan to resist organization," citing *Nickles Bakery*, 296 NLRB 927 at 928 fn. 7 (1989).² That is the case here.

¹ The name of the Charging Party has been changed to reflect the new official name of the International Union.

² The Board therefore rejected the argument that the complaint allegations were not "closely related" to the charge. *Well-Bred Loaf*,

The charge put in motion an investigation into whether, as alleged in the charge, the Respondent, in violation of Section 8(a)(1), sought to resist union organization by certain threats and a wage increase during the election campaign. Although the Region evidently discovered during the investigation that the threat and wage increase allegations lacked merit, the Region nevertheless determined that the Respondent sought to resist union organization by other forms of conduct violative of Section 8(a)(1), i.e., those spelled out in the complaint. The charge itself—putting at issue the Respondent's conduct in allegedly interfering with the freedom of employees to fairly choose their bargaining representative—advised the Respondent that it was being accused under Section 8(a)(1) of interfering with its employees' statutory rights arising from the Respondent's efforts to resist organization. The 8(a)(1) acts alleged in the complaint were part of the Respondent's efforts to resist organization. In addition, we note that the conduct alleged in the charge and complaint occurred within the same general time period.³ Finally, the allegations of the charge and complaint concern the same subsection of the Act, viz., independent violations of Section 8(a)(1).⁴ In these circumstances, the allegations of the complaint are closely related to the allegations of the charge.⁵

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and

supra. In many of our cases involving the relation between charge and complaint, we have used the term "closely related" (see, e.g., *Redd-I, Inc.*, 290 NLRB 1115 (1988); *Whitewood Maintenance Co.*, 292 NLRB 1159, 1169-1170 (1989), enf. sub nom. *Texas World Service v. NLRB*, 928 F.2d 1426, 1436-1437 (5th Cir. 1991)). In others, e.g., *Well-Bred Loaf* and *Nickles Bakery*, we have spoken of a sufficient "nexus" or have used the terms interchangeably. Nonetheless, whatever the terminology used, our precedents make clear that complaint allegations of coercive acts aimed at thwarting a union campaign may be deemed closely related to—or having a sufficient nexus with—charge allegations of coercive acts in resistance to that campaign. This is so whether or not the acts are of precisely the same kind and whether or not the charge specifically alleges the existence of an overall plan on the part of the employer. *Jennie-O Foods, Inc.*, 301 NLRB 305 (1991). We therefore do not adopt the judge's statement in the present case that "the allegations of the complaint clearly bear no specific relationship to the allegations of the charge."

³ *Well-Bred Loaf*, supra; *NLRB v. Braswell Motor Freight Lines*, 486 F.2d 743, 746 (7th Cir. 1973).

⁴ *Redd-I, Inc.*, supra, 290 NLRB at 1118.

⁵ The Respondent contends that *Nippondenso Mfg. U.S.A.*, 299 NLRB 545 (1990), compels dismissal of the complaint. *Nippondenso* is distinguishable from the instant case, and from *Well-Bred Loaf, Inc.*, because in *Nippondenso* neither the allegations of the charge nor the complaint placed at issue acts that were all part of an overall plan to resist union organization.

orders that the Respondent, Waste Management of Santa Clara Co., Inc., d/b/a Recycle America, San Jose, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Virginia Jordan, Esq., for the General Counsel.
John D. McLachlan, Esq. and *Margaret Banas, Esq. (Fisher & Phillips)*, of San Francisco, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in San Jose, California, on July 12, 1991. The charge was filed by Sanitary Truck Drivers & Helpers Local 350, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO (the Union) on January 24, 1991. Thereafter, on March 29, 1991, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations by Waste Management of Santa Clara Co., Inc., d/b/a Recycle America (the Respondent) of Section 8(a)(1) of the National Labor Relations Act, as amended (the Act). On June 28, 1991, the Regional Director issued an amendment to complaint. The Respondent's answers to the complaint and amended complaint, duly filed, deny the commission of any unfair labor practices.

The body of the charge alleges violations of Section 8(a)(1) of the Act as follows:

During the course of an election campaign related to Case No. 32-RC-3344 the employer has interfered with the freedom of the employees to make a fair choice of representation by unilaterally granting a wage increase, by making threats of retaliation in the event the union were to win the election, and by threatening punitive action against employees because of their support for the Union.

The original complaint, in pertinent part, alleges that the Respondent, at an employee meeting, solicited employee grievances and promised to remedy them, in order to undermine employee support for the Union. The amendment to the complaint, in pertinent part, alleges that on various other occasions the Respondent interrogated employees concerning their and other employees' union sympathies and activities; solicited grievances from employees and solicited the employees to solicit grievances from other employees and impliedly promised to remedy the grievances in order to discourage employee support for the Union; and solicited employees to campaign against the Union in order to undermine employee support for the Union.

The parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel and counsel for the Respondent.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a California corporation with an office and place of business located in San Jose, California, where it is engaged in the business of collecting recyclable or other refuse materials pursuant to a contract with the city of San Jose, California. In the course and conduct of its business operations the Respondent annually purchases and receives goods or services valued in excess of \$50,000 from suppliers located outside the State of California.

It is admitted, and I find, that the Respondent is now, and at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the above-named Union is, and at all material times has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues raised by the pleadings are (1) whether the complaint, as amended, should be dismissed on procedural grounds because, as alleged by the Respondent, it bears a legally insufficient relationship to the underlying charge, and (2) whether the Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

B. *The Facts*

The alleged conduct violative of Section 8(a)(1) of the act occurred during a preelection campaign. The charge was filed the day before the scheduled election. The election was held on January 25, 1991, and the ballots have been impounded pending a resolution of the instant unfair labor practice charges.

John Cook, a current employee, has worked for the Respondent as a route driver for 4 years. Cook testified that following the filing of a representation petition by the Union on November 7, 1990,¹ the Respondent conducted a series of approximately 10 employee meetings. The first meeting was held approximately 2 weeks after the petition was filed. About 35 or 40 employees were in attendance. Frank Barbera, human resources employee relations manager for Waste Management of North America, the parent corporation of the Respondent, conducted the meeting for the Respondent.

According to Cook, Barbera began the meeting by stating that he understood that some of the people wanted to join the Union, and he was there to rectify any problems that we had; he wanted the employees to tell him their problems, "so this wouldn't occur." One employee described a situation involving a racist remark from a supervisor. Barbera, according to Cook, seemed "kind of shocked" that something like that had occurred. Several employees complained about unequal distribution of routes, and Barbera said, "I will see what I

¹ All dates or time periods are within 1990 unless otherwise indicated.

can do.” Cook complained that employees did not receive enough sick leave, and Barbera made no reply. Barbera appeared to be writing down the employees’ concerns on a note pad. Cook recalled no further complaints or items brought up by the employees during the hour-long meeting, although he testified that almost the entire meeting was taken up by employees who aired their grievances. Cook initially testified that at the conclusion of the meeting Barbera said he would see what he could do about the problems presented; on cross-examination Cook testified that Barbera said he would look into those issues, and did not say that he would do anything else.

Cook testified that he had three meetings with Barbera thereafter. The meetings were held in the operations manager’s office, and no one else was present other than Cook and Barbera. The first such meeting was held about 1 week following the aforementioned group meeting. It lasted approximately 30 to 45 minutes. On that occasion, Barbera approached Cook in the plant area and said that he wanted to talk to him after work. When Cook met with Barbera in the operations manager’s office after work, Barbera at first asked Cook how his family and children were doing. Then he asked, according to Cook, “if he was losing it.” Cook asked what he was talking about, and Barbera answered, “Losing the election.” Cook said, “You know, Frank, I can’t tell you things like that.” Then Barbera asked, “Why did the guys want to go Union?” Cook replied that the employees had no choice because of all the problems they have been having. Barbera then asked him “to go talk to the guys and ask them not to vote union.” Cook said he would see what he could do. There was some discussion about changes in work rules, and Cook requested a copy of the Company’s work rules. Barbera said he would provide them. Barbera asked, according to Cook, “how many people wanted to join the union and all this?” Cook was unable to specifically recall Barbera’s words, and did not testify that he made any reply to this question.

The second meeting occurred about 2 weeks later. It also lasted between 30 to 45 minutes. Barbera again began the conversation by asking how Cook’s family was doing. He then asked “if the guys were going to vote union.” Cook replied that he couldn’t tell him that, and Barbera got kind of upset. He asked, “Who started all this? Who called the union for them to give out cards?” Cook said he did not know. Then Barbera asked what he could do so that the employees would not go union. Cook said he did not know. Then, according to Cook, Barbera “asked me to go up to the employees and ask them for their demands. And he was going to have a written contract with the employees. Maybe that would have helped it out.” Cook said he would see what he could do. Barbera also told Cook to, “See what demands they needed,” and find out “stuff that was wrong with the company.” Cook did not tell him that he would follow his instructions.

On cross-examination, Cook testified that after the point in the aforementioned conversation when Barbera became noticeably upset, Barbera said that Cook could tell him anything because it would be confidential. Cook replied, “I still can’t tell you that.” Further, he asked Cook to “go to the guys, get a list of demands, and bring them back to him.”

The third and final meeting took place about 10 days later, perhaps about the first week of December. It lasted only

about 10 minutes. Barbera asked Cook how he (Barbera) was doing. Cook replied that he thought Barbera was “losing it.” Barbera said, “Well, I guess I will have to try harder.”

On cross-examination Cook denied that he was one of the chief spokesmen for the Union, or that he was an open and active supporter of the Union. Rather, he did not express his opinion one way or the other during the election campaign. He has known Barbera for approximately 3 years, but has not spoken to Barbera until the union campaign in November. Up to that point he had seen Barbera only about two or three times as Barbera was walking around in the building talking to employees. He did not recall talking to Barbera about any complaints or problems at work prior to November, and did not learn until November that Barbera’s function was that of an intermediary between the employees and the local management.

William Judd, a current employee, has worked for the Respondent for 2 years as a commercial driver. Judd testified that the Respondent held about four or five employee meetings. At the first meeting in mid-November, attended by about 35 or 40 employees out of a total employee complement of 50 employees, Barbera said that he had heard that the employees had signed cards to become Teamsters, and that “he was there to try to rectify any problems so that we wouldn’t go union.” He asked what the problems were, and some of the employees brought up various concerns. One of the employees talked about a racial slur made by a supervisor. Barbera was astonished and said that was wrong. He wrote something down on his note pad. Two or three drivers mentioned that their particular routes were too burdensome, and that they wanted a wage increase. Barbera said that he would look into it. Judd mentioned that he thought he was working too many hours, that the manager of the facility had yelled at him one morning without justification, and “a few other things.” Barbera, who appeared to be writing down all the employees’ complaints on a note pad, commented to Judd that Judd apparently wanted more respect from his supervisor. Judd agreed. Barbera also said, according to Judd, that the employees “didn’t have to go union. That we should keep an open mind about the union thing. That we didn’t necessarily need to go union. That it was his job to take care of these things.” When asked whether Barbera at any time said what he was going to do about the matters raised by the employees, Judd testified that, “He was going to investigate it, I guess. That’s the way I took it.”

Judd testified that he met Barbera at a meeting about a month to 6 weeks after Judd began working for the Respondent. Barbera, at the meeting, asked all the employees how everything was going, and wanted to know if everything was okay. He said, “You know, that’s what I do. That’s why I’m here. That’s my job.” Judd shook hands with him and introduced himself after the meeting. Thereafter, Judd saw him at the facility about every 3 months or so. He always came by and was very friendly, and basically asked how things were going. He would go around, shake hands, and talk to most of the employees.

Judd testified that he believed that Cook was for the Union. When asked whether Cook’s support for the Union was “fairly open,” Judd replied, “Absolutely.” Judd testified that it was not until the first employee meeting in November that he learned that the Respondent had an 800 number for employees to call if they were having a problem.

Although the Respondent conducted a number of employee meetings during which it presented its views about unionization of the facility, there is no record evidence of what transpired at any such meeting other than the first meeting in November, discussed above.

Frank Barbera has worked for the Respondent's parent corporation, Waste Management of North America, since 1981. This corporation has 62,000 employees nationwide. It purchased the Respondent in August 1986, at which time Barbera met with the Respondent's 11 or 12 employees and advised them of the Company's wage and benefits package. Since 1982 the parent company has had a toll free 800 number for its employees. The number was established for the purpose of enabling any employee to call the Oak Brook, Illinois corporate office with any of his or her concerns, including personnel matters or complaints. The 800 number is included in the monthly newsletter which is available to all its employees. The newsletter, "WMI Report," an eight-page publication, contains a clearly defined box on the last page, about 1 inch by 4 inches, with the heading in bold letters, "Hotlines for WMI Employees." In the box are two 800 numbers, one called "Environmental, Health & Safety Hotline," and the other called "Employee Assistance, Employee Relations, Human Resources Hotline."

On being hired, employees are provided with an employee handbook which is an informal guideline with general information about the Company. The handbook outlines the steps of a grievance procedure, and states that if an employee's grievance is not satisfactory settled, the employee may call or write the Employee Relations Department; addresses and phone numbers, including an 800 number, are included.

Barbera testified that he visits the Respondent's facility on the average of two to three times a month. Each time he visits the facility he has discussions with employees with respect to their problems. In the event that the employees are dissatisfied with local management's resolution or handling of problems or grievances, they may either approach him personally when he is at the facility, or they may reach him through the 800 number, and Barbera will act as a conduit to local management in an effort to attempt to resolve the matter. Barbera testified at length to various matters that were brought to his attention by employees, and that he, in turn, attempted to resolve. Such matters included personality conflicts among employees, job advancement and job opportunities within the Company, harassment by local supervisors, withdrawing money from the Respondent's profit sharing fund, not being compensated for showing up to work, route imbalances among employees, management's refusal to reemploy an employee after promising him reemployment in the event another job did not work out, failure to be paid the proper rate of pay, refusal of management to assign an employee to his original route when he returned from leave after an accident, an employee's termination due to excessive accidents, and wages and benefits in general. Many of the same aforementioned grievances or problems were brought to his attention by various employees, and he would handle them individually.

Barbera testified that John Cook approached him shortly after Cook was hired in 1987, and wanted to know why some employees were not receiving overtime pay when they finished their 8 hours of work and were thereafter assigned to help on another route. Barbera looked into the situation,

and the employees were given reassignment pay. During the time Barbera was investigating the matter, but prior to any resolution, he told Cook that Cook could "probably look forward to seeing something happen at some time." Cook, according to Barbera, expressed another concern, along with other employees, regarding the balancing out of the routes. Barbera told Cook he would look into the matter. Barbera testified that between the time Cook began working for the Respondent and the beginning of the union organizing campaign in November, Barbera has had between 5 and 10 face-to-face conversations with Cook about various matters.

Barbera testified that on occasions when the Respondent was conducting its scheduled safety meeting, Barbera would ask the safety director to permit him time to talk to the assembled employees. He asked the employees how things were going, and, "You know, just general, just trying to get them to open up a little bit and to talk." Other than occasions when employees were gathered for group safety meetings, Barbera would just walk through the plant and talk with people individually.

In February 1988, Barbera conducted an attitude survey among the employees. The "Employee Opinion Survey" has a title sheet stating:

The work you do is important to you and our Company. Your opinions, comments and suggestions about your work are important in determining our Company's success. This questionnaire is to assess how you see your work.

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This survey is completely anonymous. Replies will be held in the strictest confidence. You will receive a general report on the survey findings.

The survey is a lengthy 3-page document containing 20 questions that may be answered "Yes," "No," or "?," and containing 11 additional questions with space provided for written answers or comments. The survey is comprehensive, and all phases of the employee-management relationship are addressed. Barbera testified that as a result of the survey he recommended certain changes to management, namely a more involved effort by local management in responding to the employees' concerns. He also advised the employees of the results of the survey.

Barbera testified that in mid-November, he held a meeting with all the Respondent's hourly employees. There were between 50 and 55 people in the room. He advised them that the Company had received a representation petition filed with the National Labor Relations Board, that at least 30 percent of the employees must have signed union cards indicating that they were desirous of having a union, and that he hoped they knew what they were signing. He told the employees that there are various reasons why employees turn to unions, namely, problems with wages, benefits, promotional policy or practice, and job security; however he did not know what problems they were concerned about. He said that employees had not been coming to him as they had in the past, and he therefore assumed that everything was okay; but that this clearly was incorrect as there is a clear message that things are not okay when people want to turn to a third party to try to get internal matters resolved. At that point, one employee said, "Well, you can't do anything." Barbera

replied that, "That's not true. Because there's people in the room . . . that we have responded to and for the most part resolved some of these things." Then one driver, who was upset about a racial slur by a supervisor, stated his complaint. This, according to Barbera, "open[ed] the floodgates" and prompted a number of complaints from other black employees with similar allegations. Then employees mentioned the route imbalance, wage matters, and other items, including the contention that Barbera had not been around as much. In response to the latter remark, one employee said that was not correct, and that, "you guys have had an opportunity to talk to this guy for years. He's been around for years." Barbera testified that he wrote down the items when they were brought up as he did not want to forget any of them. Barbera said he would look into the matters the employees had raised.

Barbera testified that he had only one meeting with Cook in the operations manager's office. The meeting came about in early to mid-December, when Cook approached him in the warehouse and asked how soon the Respondent could get "other matters" fixed. Barbera asked him what he was talking about, and Cook said that he understood that Supervisor Jeff Harrison, who had been accused of making the aforementioned racial slur, had been transferred to another of the Respondent's facilities as a result of the complaints against him. Barbera invited Cook upstairs to the manager's office, as the warehouse floor was not a convenient place for a conversation.

In the manager's office, after some discussion of the Harrison matter, Cook again asked how soon the other matters that had been brought up in the meeting could be fixed, and specifically referred to the imbalanced routes and the wage increase that they did not receive in January. Barbera told him that, "The other matters can't get fixed"; and he explained that the Respondent would have to wait until the union situation was resolved one way or the other before it could look into those things more thoroughly, because he didn't want it to be perceived that the Respondent was trying to buy the favor or the vote of any employee. There was more discussion of the Harrison matter, and Cook said he hoped that Harrison, who was Cook's immediate supervisor, didn't lose his job. Cook asked if the Respondent had contracts with employees at nonunion facilities, and whether the employees could get something in writing. Barbera replied that the Company does have such contracts at nonunion facilities, but not within California. There was discussion about what such a contract may contain, and Cook said that he would like to see one. Barbera does not recall Cook asking for a copy of the Respondent's work rules. There was some talk about Cook's family, and Barbera asked Cook how his bike riding was coming along, as he knew that Cook was interested in this activity. The conversation lasted about 30 minutes.

The next conversation occurred in early January 1991. Barbera hopped up on the running board of Cook's truck and asked him how things were going. He told Cook to "keep an open mind on this thing," referring to the representation election which was scheduled for January 25, 1991. They discussed the union situation for about 5 to 8 minutes. Barbera testified that during the union campaign he believed that Cook was an open supporter of the Union because, on one earlier occasion Cook mentioned that his father was the

shop steward for Teamsters Local 350 at the Respondent's Comstock facility, located about 10 minutes away, and Cook seemed to be very proud of this fact. During the instant conversation, Barbera told Cook that, "Just because Comstock employees have certain benefits and work under certain rules and conditions, that doesn't mean it's going to carry over to [the Respondent]." There was further discussion about the Union and the negotiating process, and Cook said that he was going to "give it [the union] a try."

On another occasion, Barbera was talking to another employee outside the building. Cook came by and yelled something like, according to Barbera, "You are still putting out your bullshit, Frank." Barbera said, "Yes, come over here, John, you might learn something." Cook came over and listened for awhile and then walked away. There were no further meetings or conversations with Cook.

Barbera testified that at no time did he ask Cook how the Company was doing with regard to the election campaign, or if the Company was losing the election, or whether the employees intended to vote the Union in, or why Cook wanted the Union. He did not request Cook to get other employees to vote against the Union, or promise that any changes for the better would be made if the Union went away. And he did not ask Cook to report to him about what benefits the other employees wanted, or ask him who started the Union or called the Union.

Barbera acknowledged that the employees were given a wage increase in January 1991, prior to the Board election which was held on January 25, 1991; they had been given a bonus check in June 1990, at which time they were also told that they would be receiving a wage increase in January 1991. Barbera was questioned on cross-examination about his statement to Cook that nothing could be done about wages and other matters at that time because of the pendency of the election. Barbera at first said that wages were not foremost in Cook's mind at the time; he then testified that he may have said that to Cook, but he doesn't recall saying it, and he did not recall Cook saying anything about wages particularly; then he acknowledged that he had testified earlier that Cook did bring up the subject of wages, and testified that, "realizing his personality and his being supportive of the union, I was very select in what I said, particularly to him at that meeting. I knew there was going to be something happening in January. I didn't want to tell him that and have him think that we are doing it only because trying [sic] to buy his vote and other people's."

Regarding Cook's support of the Union, Barbera testified that Cook told him this prior to any union activity; he also testified, however, that Cook's support of the Union came up "more directly" during the conversation on the runningboard of Cook's truck, when he reiterated the fact that his father was happy with being a union member at the Comstock facility, and he was going to give it a try. Barbera testified on redirect that at the first employee meeting in mid-November, Cook demonstrated his union support when he asked why the vacation policy at the Comstock yard was more generous than at the Respondent's plant. Barbera replied that, "that's what was negotiated for." Cook then said, "Well, that's what we'll negotiate when the union comes in." He also said that he and Cook never specifically discussed wage increases.

Cook, called by the General Counsel as a rebuttal witness, testified that he at no time had any conversation with Barbera concerning the fact that his father was a union steward at another facility operated by the Respondent; that he had no conversation with Barbera on any occasion when Barbera hopped on the runningboard of his truck; and that he did not recall any occasion when he told Barbera to “knock off the bullshit” while Barbera was conversing with other employees. Further, Cook testified that he was “pretty sure” that Barbera, as well as everyone else, knew that his father was a union steward. Regarding the various alleged conversations on prior occasions which Barbera mentioned, Cook testified that he never had any conversation with Barbera concerning the reassignment pay issue in November or December 1987; nor did he have a conversation with him in 1988 regarding the route balancing matter.

Vincent Parker, a current employee, has worked for the Respondent for 18 months. He has picked up copies of the Respondent’s monthly newsletter at the facility, and is aware of the 800 number which, according to Parker, is for anyone who has problems that cannot be resolved. He called the number on one occasion to get some specific information about a different job (the sending of employees to Kuwait for cleanup operations). He was told about the 800 number on being hired, and the number is also posted in the breakroom in the plant. Parker testified that Barbera comes to the plant about once or twice a month, and that he has spoken to Barbera on various occasions about work-related problems. On one occasion, about 3 months after he was hired, he phoned Barbera about a serious problem involving a confrontation with another driver and a supervisor. The problem was resolved. On another occasion his complaint resulted in a meeting with Barbera and various employees at the plant. It, too, was resolved. Parker also suggested to other employees that they could call Barbera about their problems. Parker testified that during the union campaign he believed that Cook supported the Union because Cook talked about the benefits of the Union and told him that his father was involved with a union.

Richard Saiz Jr., a current employee, has worked for the Respondent about 4 years. When the predecessor company was purchased by the Respondent’s parent company, the employees and their families were invited to a dinner meeting attended by various company executives. The assembled employees were advised by labor relations representatives of the 800 number they could call; and Barbera explained to Saiz, personally, that if he had any problems he should call him or get in touch with him. Barbera comes to the facility about once a month, and Saiz has spoken to him about problems that were on his mind at the time. John Cook told Saiz, as a friend, that he was in favor of the Union. He also told him that his father was a union official or steward at another of the Respondent’s facilities.

Juan Corrales, currently a first-line supervisor, corroborated the testimony of the foregoing witnesses regarding widespread use by employees of the 800 number and of their communications with Barbera regarding problems that were not able to be resolved without Barbera’s intervention. Corrales also testified that Cook had mentioned to him prior to October, when he became a supervisor, that Cook thought it would be a good idea if the Company went union. However, after October, when Corrales became a supervisor, he

had no further conversations with Cook about the Union, and Cook “wouldn’t even hardly” talk in front of him thereafter.

C. Analysis and Conclusions

The Respondent, citing *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), and *Nippondenso Mfg. U.S.A.*, 299 NLRB 545 (1990), maintains that the complaint should be dismissed because the allegations of the complaint and amended complaint are not sufficiently related to the allegations of the charge filed by the Union.

The charge in this proceeding alleges that “[d]uring the course of an election campaign related to Case No. 32-RC-3344 the employer has interfered with the freedom of the employees to make a fair choice of representation” by granting a wage increase, and by threatening employees with retaliation and punitive action. The complaint and amended complaint contain no such allegations. Rather, the complaint alleges that the Respondent interrogated employees regarding their union activity and the union activity of other employees, solicited grievances from employees and impliedly promised to remedy them, solicited employees to solicit grievances from other employees and impliedly promised to remedy them, and solicited employees to campaign against the Union.

The allegations of the complaint clearly bear no specific relationship to the allegations of the charge. However, both the charge and the complaint allege that the Respondent has committed violations of Section 8(a)(1) of the Act; and such violations occurred, as the charge specifically states, “[d]uring the course of [the instant] election campaign.”

In *Well-Bred Loaf, Inc.*, 303 NLRB 1016 fn. 1 (1991), the Board determined, in similar circumstances, that there was “a sufficient nexus between the allegations in dispute and the charge allegations because they all occurred within the same general time period and concern conduct which constitutes an overall plan to resist the Union.”

I find the Board’s rationale in *Well-Bred Loaf*, supra, to be controlling in the instant situation, and therefore I conclude that the Respondent’s contention that the complaint and amended complaint be dismissed on this procedural ground is without merit. I find no merit in the Respondent’s argument that *Well-Bred Loaf* is distinguishable from the instant case on the basis that the charge and complaint in the cited case are more closely related. The Board did not analyze the specific relationship between the allegations of the charge and those of the complaint and conclude that they were closely related; rather, the Board determined that, generally, the charge and complaint alleged violative conduct within the limited timeframe of an antiunion campaign. Such is the relationship between the charge and complaint in the instant case.

Abundant record evidence establishes that Human Resources Employee Relations Manager Barbera acted as a type of “ombudsman” as a buffer between employees and local management, and that he has been actively engaged in this endeavor for approximately 4 years prior to the instant union campaign. He has solicited employee complaints and grievances in the past, and has told employees that he will look into them, and, on occasion, he has resolved them. Further, such solicitation of grievances has occurred during the course of group meetings as well as during one-on-one conversations with employees whom he happens to encounter as he

tours the facility. In addition, the employees have been clearly apprised of the fact, through the employee handbook, monthly newsletters, and a notice posted on the bulletin board, that they may approach higher management with their concerns by dialing a toll free 800 number.

The meeting conducted by Barbera in mid-November was unlike prior meetings in that it was initiated by the Respondent in direct response to the Union's filing of the representation petition. Barbera, during the course of his remarks, admittedly expressed concern about the attempt to organize the employees, and wondered why the employees were seeking union representation in an environment where their grievances and concerns could be brought to the attention of management. He also asked what their concerns were, made notes of the employees' responses, and said that he would look into them. However, he made no explicit promises to resolve any of the matters raised by the employees.

The General Counsel argues that under the foregoing circumstances it was reasonable for employees to believe that the juxtaposition of Barbera's remarks with the filing of the representation petition and the commencement of the Respondent's antiunion campaign connoted an implied promise to actively remedy certain concerns of the employees. I conclude, however, that the solicitation of grievances by Barbera, either on an individual basis or, occasionally, at group meetings, was not an extraordinary occurrence which would reasonable cause the employees to believe that their grievances and concerns would be treated any differently than they had been in the past; it appears that Barbera's remarks at the meeting, including his remark that he would look into the matters presented, were similar to and consistent with his prior handling of matters brought to his attention by the employees. In this regard there is some discrepancy in the record regarding Barbera's precise remarks; employees Cook and Judd both testified that Barbera initially said he was there to "rectify" the employees' concerns, and that Barbera also said he would "look into" them. This seems to indicate that the employees understood Barbera to be saying that he would look into the matters raised by the employees and that he would resolve them if it was feasible to do so. Such statements, considered in context, do not appear to connote a promise that the employees' current concerns would be treated any differently than they had in the past.

In *Butler Shoes New York*, 263 NLRB 1031, 1032-1033 (1982), the Board stated:

Nor do we find merit in the General Counsel's exception to the Administrative Law Judge's failure to find that Lastinger's October 4 speech contained unlawful solicitations of grievances. Lastinger reminded employees of Respondent's existing "open door policy whereby the employees are encouraged to take up any problems that they may have relating to their employment with their supervisor" or with higher management, and stated that "Management sincerely wants to know what its employees are thinking and feeling because it feels that the comments and questions of the employees serve as guideposts." Boroughs echoed the substance of these remarks. Solicitation of grievances, however, is unlawful when it is a form of promise of benefit for rejecting a union and, therefore, may be violative when it expressly or impliedly includes a promise to redress

such grievances as are submitted. Here, Respondent announced no new policy and did not imply that its response to grievances would change. Accordingly, it acted lawfully. Cf. *Chester Valley, Inc.*, 251 NLRB 1435, 1447-1448 (1980). [Footnote omitted.]

See also *Logo 7 Inc.*, 284 NLRB 204, 205 (1987).

On the basis of the foregoing, I shall dismiss this allegation of the complaint.

The testimony of Cook and Barbera is diametrically opposed. The only seeming area of agreement between them is the acknowledgment that there were three conversations; the contents and even the locations of the conversations are in dispute.

Cook's testimony that he had seen Barbera around the facility only two or three times during the years he had been employed, that he did not know Barbera's purpose for being there, and that he was not an active union adherent, seems questionable when compared with the testimony of the other employees, whom I credit. Moreover, it seems unlikely that Barbera would have continued to enlist Cook's cooperation in combating the Union after Cook refused, at the outset of the initial conversation, to answer Barbera's question and responded that "You know, Frank, I can't tell you things like that"; and it also seems unlikely that Barbera would, with no overtures from Cook, single Cook out as an emissary to solicit information from the employees and report back to Barbera. Cook did not testify that he told any other employees about his alleged conversations with Barbera. Further, there is no evidence that Barbera approached any other employees with similar requests, or that the Respondent engaged in other acts of unlawful conduct during the election campaign. While Cook did not appear to have a comprehensive recollection of everything discussed during the first two 30- to 45-minute conversations, and merely summarized them in abbreviated fashion, his testimony remained consistent throughout substantial cross-examination, and he appeared to be testifying in a forthright manner.

On the other hand, while Barbera, during his direct examination, displayed a particularly comprehensive recollection of the conversations he allegedly had with Cook, the record evidence demonstrates inconsistencies in his testimony; thus, on cross-examination, he appeared to exhibit no hesitancy in changing and embellishing his testimony.

There appears to be no reason why Cook, who has worked for the Respondent for 4 years, would deliberately fabricate his testimony, and his consistency and ostensible, albeit abbreviated, recollection of the conversations indicate that such or similar conversations did occur. Although Cook's versions of the various conversations seem unlikely, as noted above, this does not mandate the conclusion that Cook is not to be believed. Thus, the record demonstrates that Barbera is a direct, effusive, and spontaneous individual who, during the course of one-on-one conversations with Cook, may not have hesitated to express what was on his mind in no uncertain terms, regardless of Cook's reluctance to answer his questions. Moreover, and of considerable significance, is the fact that Cook's testimony remained consistent, while Barbera changed his testimony with some facility, as shown above, and thus demonstrated that he was not reluctant to tailor his testimony to fit a different scenario.

In assessing witness credibility, I am mindful of the Board's guidance that current employees are not likely to fabricate their testimony. *S. E. Nichols, Inc.*, 284 NLRB 556 fn. 2 (1987); *Roadway Inn of Las Vegas*, 252 NLRB 344, 346 (1980).

On the basis of the foregoing, I shall credit Cook's testimony. I therefore conclude that Barbera made the statements attributed to him by Cook. Thus, I find that Barbera interrogated Cook about his union activity and the union activity of other employees, solicited grievances from Cook and requested him to solicit grievances from other employees, and encouraged Cook to campaign against the Union. The Respondent has not demonstrated that such requests by Barbera to Cook, who expressed his reluctance to answer Barbera's questions or to otherwise cooperate with Barbera, were non-coercive in nature. Under the circumstances, I conclude that such interrogation, solicitation of grievances, and encouragement of Cook to campaign against the Union, constitute unlawful conduct violative of Section 8(a)(1) of the Act. See *Rossmore House*, 269 NLRB 1176, 1177 (1984), *affd.* 760 F.2d 1006 (9th Cir. 1985); *Color Tech Corp.*, 286 NLRB 476 (1987); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has engaged in violations of Section 8(a)(1) of the Act as found.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Moreover, the Respondent shall be required to post an appropriate notice attached as an appendix.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Waste Management of Santa Clara Co., Inc., d/b/a Recycle America, San Jose, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Coercively interrogating employees regarding their union activity and the union activity of other employees.
 - (b) Soliciting grievances from employees and impliedly promising to remedy the grievances.
 - (c) Soliciting employees to campaign against the Union in an effort to undermine support for the Union.

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at the Respondent's San Jose, California facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted immediately upon receipt and maintained by the Respondent for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

³If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate employees about their union activity or the union activity of other employees.

WE WILL NOT solicit grievances from employees and impliedly promise that we will resolve their grievances in order to discourage their support for the Union.

WE WILL NOT solicit employees to campaign against the Union in order to undermine support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WASTE MANAGEMENT OF SANTA CLARA CO.,
INC., D/B/A RECYCLE AMERICA